(27,066)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 980.

JOHN VALLELY, AS TRUSTEE IN BANKRUPTCY OF THE NORTHERN FIRE AND MARINE INSURANCE COMPANY,

vs.

NORTHERN FIRE AND MARINE INSURANCE COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 1, 1919.

1 United States Circuit Court of Appeals, Eighth Circuit.

No. 195, Original.

JOHN VALLELY, as Trustee in Bankruptcy of the Northern Fire & Marine Insurance Company, a Corporation, Petitioner,

vs.

NORTHERN FIRE & MARINE INSURANCE COMPANY, a Corporation, Respondent.

Certificate to the Supreme Court of the United States.

The United States Circuit Court of Appeals for the Eighth Circuit hereby certifies that a record now pending before it on a petition to revise in matter of law an order of a district court sitting as a court of bankruptcy, discloses the following:

On May 3d, 1917, certain creditors of the Northern Fire & Marine Insurance Company filed a petition in the District Court of the United States for the District of North Dakota to have it adjudged an involuntary bankrupt. It was averred in the petition that the bankrupt was a corporation organized under the laws of North Dakota and had been until recently "engaged in the business of insuring property against loss by fire, hail etc." A subpœna was issued and served upon the bankrupt, but it made default, and an order of adjudication was entered by a referee in bankruptcy.

2 No appeal was taken from the order. Creditors appeared and proved their claims, and at their first meeting, June 21st, 1917 selected a trustee of the bankrupt's estate who qualified and entered upon his duties. Thereafter and until December 18, 1917, the trustee was engaged in administering the estate. He collected assets, reduced them to money, made payments to protect equities of the estate, and brought suits in his official capacity. He frequently conferred and advised with the president and secretary of the bankrupt and their attorneys, and received from them coöperation, assistance and information in the above matters without question on their part or by the bankrupt of the validity of the adjudication. The president and secretary of the bankrupt attended several meetings of the creditors and without objection submitted to an examination under oath as to the affairs of the bankrupt as required by law. Considerable moneys were paid out and expenses incurred by the trustee. After the above, and on December 18, 1917, the bankrupt by its attorneys filed a motion in the district court to vacate the adjudication as null and void and to dismiss the bankruptcy proceeding, upon the ground that it appeared upon the record that it, the bankrupt, was an insurance corporation and that the court of bankruptcy was therefore without jurisdiction. The district court sustained the

3 motion and entered an order vacating the adjudication and dismissing the creditors' petition upon the authority of sec-

tion 4-*b* of the bankruptcy Act as amended by the Act of June 25, 1910 (36 Stat. 839), which provides that "any moneyed, business, or commercial corporation, except a municipal, railroad, insurance, or banking corporation * * * may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act." The trustee filed a petition in this court to revise the order below in matter of law.

It is further certified that the following questions of law are presented by the petition to revise prosecuted by the trustee in bankruptcy, the decision of which is indispensable to a determination of the case, and to the end that this court may properly discharge its duty it desires the instruction of the Supreme Court upon them:

1. Is a petition to revise in matter of law under section 24-*b* of the Bankruptcy Act the proper remedy to review an order of an inferior court of bankruptcy vacating an adjudication and dismissing the bankruptcy proceeding for want of jurisdiction upon the motion of the bankrupt after the expiration of the time for appeal, he having neither contested the involuntary petition against him nor appealed from the adjudication?

4 2. Where it appears from the averments of a petition in involuntary bankruptcy that the person proceeded against is an insurance corporation and therefore within the exceptions of section 4-*b* of the Bankruptcy Act as amended June 25, 1910 (36 Stat. 839), is there such an absence of jurisdiction in the court of bankruptcy that its adjudication, rendered upon due service of process and default, and not appealed from, should be vacated and the proceeding be dismissed upon the motion of the bankrupt after the time for appeal has expired?

3. Where an insurance corporation adjudged bankrupt in an involuntary proceeding after the passage of the amendatory Act of June 25, 1910, (36 Stat. 839) upon due service of process and default, does not appeal from the adjudication but acquiesces therein and aids the trustee in the performance of his duties in administering the estate, may it be estopped from thereafter questioning the validity of the adjudication and the power of the court and the trustee to proceed?

WILLIAM C. HOOK,
Circuit Judge.
KIMBROUGH STONE,
Circuit Judge.
THOS. C. MUNGER,
District Judge.

5 United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the above named Court, do hereby certify that the foregoing certificate in the case of John Vallely, as Trustee in Bankruptcy of the Northern Fire and Marine Insurance Company, a corporation, Petitioner, vs. Northern Fire and Marine Insurance Company, a corporation, No. 195, Original, was duly filed

and entered of record in my office by order of said Court, and as directed by said Court, the said certificate is by me transmitted to the Supreme Court of the United States for its action thereon.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this twenty-second day of March, A. D. 1919.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

[Endorsed:] U. S. Circuit Court of Appeals, Eighth Circuit. December Term, 1918. No. 195, Original. John Vallely, as Trustee in Bankruptcy, etc., Petitioner, vs. Northern Fire and Marine Insurance Company. Certificate of Questions to the Supreme Court of the United States. Filed Mar. 22, 1919. E. E. Koch, Clerk.

Endorsed on cover: File No. 27,066. U. S. Circuit Court of Appeals, Eighth District. Term No. 980. John Vallely, as Trustee in Bankruptcy of The Northern Fire & Marine Insurance Company, vs. Northern Fire & Marine Insurance Company. (Certificate.) Filed April 14th, 1919. File No. 27,066.

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Supreme Court of the United States

OCTOBER TERM, 1918.

No. 980.

JOHN VALLELY as Trustee in Bankruptcy of the NORTHERN FIRE & MARINE INSURANCE COMPANY, a corporation,

Plaintiff in Error,

vs.

NORTHERN FIRE & MARINE INSURANCE COMPANY,

Defendant in Error.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

Brief and Argument for Plaintiff in Error

STATEMENT OF CASE

The respondent was adjudicated an involuntary bankrupt under the Federal Act on the 28th day of May, 1917. It was a default adjudication, the respondent failing to appear in response to the order and subpoena served upon it. Petitioner was subsequently, and on the 21st day of June, 1917, appointed trustee of the estate of respondent, and qualified. He took charge of the affairs of the respondent and administered the estate as trustee without any objection or question being raised until the 18th day of December, 1917, when respondent filed a motion to dismiss the bankruptcy proceedings upon the grounds that the respondent was not a corporation amenable to the bankruptcy law, and that the bankruptcy court had no jurisdiction. It appears by the petition in bankruptcy and is

conceded by this petitioner, that the respondent was engaged in the fire insurance business, and that a corporation engaged in such business is within the exceptions mentioned in section 4 of the Bankruptcy Act. After the adjudication and appointment of petitioner as trustee, meetings of creditors were held at which the executive officers of the respondent appeared and submitted to examination under the bankruptcy act, schedules of the assets of the corporation in accordance with the requirements of the act were made in the making of which, as well as in the management and transaction of other items of the business of the corporation by the trustee, the officers and representatives of the respondent participated and assisted. Reference is made to the affidavit of the trustee for further particulars with respect to the participation by the executive officers of the respondent in the conduct of the business of respondent by the trustee, and recognition by them of the authority of the trustee. This affidavit will be found in the record.

It further appears from this affidavit that certain transactions have been consummated by the trustee in connection with the management of the business of the respondent, and certain moneys of the estate disbursed by the trustee, all upon the strength of the proceedings had in the bankruptcy court, which if the bankruptcy proceedings are dismissed, will result in substantial loss and prejudice to the estate. That considerable litigation has been inaugurated, and expense paid out and incurred, which will be of little or questionable benefit to the estate if the bankruptcy proceedings are dismissed.

Under the situation as disclosed by the record petitioner claims that the bankruptcy court has jurisdiction, and that the respondent is estopped from questioning the validity of the adjudication or the appointment of petitioner as trustee.

SPECIFICATION OF ERRORS

The bankruptcy court erred in the entry of its order dismissing the bankruptcy proceedings for lack of jurisdiction.

ARGUMENT

It is the contention of the petitioner that the filing of the petition for the adjudication of respondent as an involuntary bankrupt and the subsequent service of order and subpoena upon the respondent conferred jurisdiction upon the bankruptcy court to pass upon the question as to whether or not the case were a proper one for adjudication. That adjudication, whether erroneous or not, is binding.

Further, in view of the course pursued by the respondent since the adjudication and the appointment of petitioner as trustee, it is estopped at this time from questioning the jurisdiction of the bankruptcy court.

Respondents claim, as we understand it, is that the Bankruptcy court could not acquire jurisdiction as against it because it is excepted from the provisions of the bankruptcy act.

It is true that the petition for bankruptcy shows that the business of the respondent was insurance. We also concede that if appearance and objection to the adjudication had been made the respondent would have been entitled to a dismissal. However, it is settled that an erroneous adjudication against an exempt corporation, whether made by default or upon a contest or trial before the bankruptcy court, can be attacked only by appeal, writ of error, or prompt motion to vacate.

The adjudication as a bankrupt of an exempt company stands exactly upon the same basis as any other decision of a trial court. It may be erroneous under the facts or law applicable thereto, but

such error must be corrected in a proper manner, and if not so corrected the decision is binding. Again, the adjudicated cases establish beyond any question that a corporation which is not expressly amenable to the bankruptcy act, but which makes no objection to the adjudication, and subsequently acquiesces therein and co-operates with the trustee in the handling and conserving of the assets of the estate, will not, after a considerable period of time has elapsed, be permitted to question the jurisdiction of the bankruptcy court. This is especially true where loss and prejudice would result to the estate.

The bankruptcy court in making the order of which we complain clearly disregarded the decisions of this court as well as the decisions of courts of other jurisdictions. The holding of the cases upon this question is substantially as follows:

The filing of a voluntary petition, and the filing of an involuntary petition and service of a subpoena, *not the allegations in the petition*, vests the court with jurisdiction of the subject matter and of the persons concerned. As soon as the petition is filed, and if the proceeding is an involuntary one, the subpoena has been served, jurisdiction is complete for the hearing and determination of all the issues involved, whatever the ultimate decision of the court may be. Section 4 does not relate to the jurisdiction of the court over the subject matter. It does not, therefore, create or limit the jurisdiction of the court with respect to its power to consider and pass upon the merits of the petition. It relates to the kind of judgment or decree which may be rendered by the court in disposing of the petition. The effect of the provision is that a person who belongs to one of the excepted classes should not be adjudicated a bankrupt, not that no adjudication at all can be made by the court if the person concerned belongs to one of the excepted classes.

As soon as a petition is filed, the court has a duty to perform. It has the duty, and the statute gives it the power to decide whether an alleged bankrupt comes within the class that should be declared a bankrupt. The decision of that fact involves the exercise of jurisdiction. The jurisdiction is none the less real and valid because the court might decide the question wrongly. The valid exercise of jurisdiction does not depend on the correctness of the decision. Neither the allegation nor the fact that the alleged bankrupt is an insurance company, and as such exempt, is jurisdictional. If the court in the exercise of that power reached a wrong conclusion, the judgment is not void; it is merely error to be corrected on appeal or by motion to vacate, timely made, but as long as it stands it is binding on every one. We call attention to the following decisions of this court:

In re Worsham, 142 Fed. 121;
Edelstein vs. U. S., 149 Fed. 636;
Foltz vs. Railway Company, 60 Fed. 316;
In the matter of the First National Bank, 152 Fed. 64;
In re Broadway Savings Trust Co., 152 Fed. 152;
In the matter of Cordage Company, 135 Fed. 1000.

The following decisions from other jurisdictions are to the same effect:

In the matter of the New England Breeders Assn., 169 Fed. 586 (CCA);
Burch vs. Steele, 165 Fed. 577 (CCA);
In the matter of Hall, 159 Fed. 73 (CCA);
Sabin vs. Larkin, 218 Fed. 984;
Russell Bros. vs. Continental Co., 235 Fed. 343;
In the matter of Brett, 130 Fed. 981;
First National Bank vs. Klug, 186 U. S. 202;
DesMoines, etc. vs. Iowa Homestead Co., 123 U. S. 552;
In the matter of Columbia Real Estate Co., 101 Fed. 971;
McCormack vs. Sullivant, 10 Wheaton 192.

In most of the cases cited the question related to the jurisdiction of the court where it appeared that the corporation against

whom adjudication was sought was not one coming within the purview of the bankruptcy act. Other cases relate to the jurisdiction of the Federal Court generally, arising in instances where a diversity of citizenship was not shown. The principle involved is the same, and so recognized by the decisions of this as well as other courts.

In the matter of First National Bank, 152 Fed. 64, cited supra, this court used the following language:

> "Jurisdiction does not so far depend upon the question whether the defendant is one of the persons or corporations subject to the act, or is exempt, as to open the adjudication to attack upon this ground."
>
> "Jurisdictional facts are those which condition the power of the court to decide some of the issues of the case, like the nature of the subject matter and the service of process. Other facts, which condition the character of the decree, or the nature of the relief that should be granted or denied, are not jurisdictional, and final adjudication of issues relating to them conclusively estop the parties to a proceeding from again litigating them. *The issue whether or not a corporation is subject to adjudication as a bankrupt, is not jurisdictional, and is concluded by the adjudication.*"
>
> "While the jurisdiction of the national courts is limited, they are not inferior courts, and their judgments possess every attribute of finality and estoppel appertaining to courts of general jurisdiction. The absence from their record of all appearance of jurisdictional fact is immaterial."

This court cited and relied upon as being decisive of the question the decision in the case of McCormack vs. Sullivant, supra, wherein the question related to the jurisdiction of the Federal Court generally in a case where diversity of citizenship did not appear. Referring to the case of McCormack vs. Sullivant, this court said:

> "Thus, in McCormack vs. Sullivant, diversity of citizenship was indispensable to the jurisdiction of the federal court which had rendered a judgment, *and it nowhere appeared in the record.* But the judgment was held conclusive in the absence of any writ of error to reverse it."

The following conclusion was announced by this court in the case from which we have already quoted:

> "The adjudication in bankruptcy in this case, therefore, until reversed or vacated in some direct proceeding, conclusively estopped all the parties to this proceeding, including the petitioning creditor, from claiming on the record, or upon evidence aliunde that the Widell Company was not principally engaged in a manufacturing pursuit, and was not rightly adjudicated a bankrupt."

The court also cited the decision in the case of Des Moines Navigation Co. vs. Iowa Homestead Co., 123 U. S. 552, as being a conclusive precedent. In that case it appeared upon the record that one of the defendants was a resident of the same state as the plaintiff, but no objection was made until after trial and judgment. It was held that the objection had been waived.

The doctrine of this case was reiterated by the court in the matter of Broadway Savings & Trust Co., 152 Fed. 152. Note the following language:

> "It (the bankruptcy court) has the same jurisdiction of the cause and of the parties, and the same power to determine the issues between them, whether the company was or was not engaged in one of the pursuits mentioned in section 4-B of the Bankruptcy Law. The difference the decision of that issue made was that if it was so engaged the court should have given judgment for the petitioner, and if it was not so occupied, it should have refused to adjudicate the trust company a bankrupt."

In a prior decision involving this question, in the matter of Worsham, 152 Fed. 121, this court, among other things, said:

> "When a bankrupt and all of his creditors have recognized the validity and regularity of proceedings in a court of bankruptcy, have participated therein, and sought the benefit thereof, one of such creditors will not be heard, long after the adjudication, to object to the jurisdiction of the court upon the ground that the proceedings were instituted in a district in which the bankrupt did not reside, or have his domicile or principal place of business for the greater portion of the preceding six months; nor upon the ground that a subpoena to

> the bankrupt was not issued, he having voluntarily waived the same and entered his appearance; nor upon the ground that the petition failed to allege that the bankrupt was not a wage earner, or person engaged chiefly in farming or tillage of the soil, and for like reasons, he will not be permitted to otherwise contest the petition upon which the adjudication proceeded."

The doctrine thus announced should be a conclusive answer to the attempt of the respondent to question the validity of the bankruptcy proceedings.

In the cases from which we have quoted, the delay in raising the objection to the jurisdiction of the court was much less than in the case at bar. Particular emphasis however was laid upon the fact that there had been some delay, and even though it were not great in those particular cases, the court took notice of the fact that the speedy administration of bankrupt estates is contemplated by the law, and that prejudice and loss would result if interested parties were permitted, after recognizing proceedings of this kind, and participating therein, to question the validity thereof. The facts established in the record in this case show clearly that loss would result to the general creditors of respondent if the proceedings taken by the petitioner in connection with managing and conserving the estate of the respondent are ignored, and the bankruptcy set aside.

The judge of the bankruptcy court took the position that because the petition for adjudication showed that the corporation did not come within the terms of the law with respect to those who may be adjudicated an involuntary bankrupt, the court was without jurisdiction to proceed, and all subsequent acts of the court and the trustee were nullities. This conclusion is in direct conflict with the decisions which we have quoted.

For instance, in the case of Foltz vs. Railway Company, supra,

an attempt was made to question a condemnation judgment entered in a certain action, and the ground of attack was that the parties in whose favor the condemnation decree had been entered did not have legal capacity to condemn land. This court said that that was a matter to be determined by the court rendering the judgment. It was found that the objecting party, defendant in the condemnation suit, was properly served with statutory notice in the condemnation proceeding, and participated therein. The case was in the Federal Court, there was a diversity of citizenship, and the amount in controversy exceeded the statutory requirement. The court, among other things, said:

> "That court, therefore, had jurisdiction of the parties. It goes without saying, that the Circuit Court had the right and the power to render a judgment of condemnation in a proper case in favor of a railroad corporation, which had the right to exercise the power of eminent domain * * *. The contention is that it is an absolute nullity in this case because the court entered judgment in favor of a corporation which had not that right (the right to exercise eminent domain). Stripped of argument and verbiage, the position is that this judgment was void because the appellee had not legal capacity to sue for it, although there were many parties that had such capacity, in whose favor the Circuit Court had ample power to enter such a judgment. But the question of the legal capacity of the plaintiff to prosecute condemnation proceedings, like that of the necessity for the condemnation, and not of the public or private purpose of it, is a question that the trial court must necessarily hear and determine in every condemnation proceeding. Is every judgment in which the court committed an error in the decision of one of these questions, without the jurisdiction of the court, a nullity, and only those in which it has made no mistake valid? Jurisdiction of the subject matter is the power to deal with the general abstract question, to hear the particular facts in any case relating to this question, and to determine whether or not they are sufficient to invoke the exercise of that power. It is not confined to cases in which the particular facts constitute a good cause of action, but it includes every issue within the scope of the general power vested in the court by the law of its organization, to deal with the abstract question. Nor is this jurisdiction lim-

ited to making correct decisions. It empowers the court to determine every issue within the scope of its authority according to its own view of the law and the evidence, whether its decision is right or wrong, and every judgment or decision so rendered is final and conclusive upon the parties to it, unless reversed by writ of error or appeal, or impeached for fraud."

In the response or answer to the petition for review that has been filed on behalf of the insurance company, an attempt is made to raise an issue upon certain facts more or less material to the present inquiry. It is alleged that "neither the executive officers of said respondent or their attorneys or any other person in authority at any time knowingly did any act to recognize or acquiesce in the bankruptcy proceedings thus pending, and that all acts so done by the said executive officers of said respondent, were done under the belief that such acts were required under the laws of the United States and the practice of said court."

It is further alleged that the affidavit of Vallely presented in opposition to the motion to vacate the adjudication, folio 21, et seq., printed record, was controverted upon the hearing before the court, "but neither the allegations or the controversion thereof was considered by the court sitting upon the motion."

Again it is alleged "That there was no question of fact involved in said hearing, and no controverted fact considered by the District Court or the Judge thereof, in passing upon the petition for discharge; that the only question considered by that court, as shown by the order and memorandum opinion filed, was whether considering all of the facts as set forth in the petition in bankruptcy, the District Court was without jurisdiction to make the adjudication," etc. And the suggestion is made that the order of the trial court setting aside the proceedings is in effect a refusal to adjudicate the respondent a bankrupt.

We find the statement also that notice of application to set

aside the adjudication was ordered served upon creditors, of which there are a great number, and upon Vallely, the petitioner. That this was done, and Vallely alone objects.

The record made in the court below must control in this court. Statements made in the response or answer of the insurance company must be disregarded, except insofar as borne out by the evidence and record that were before the lower court. It is now too late to interpolate into this record evidence or matters not called to the attention of the bankruptcy court. Certainly the bare allegation in an answer can have no probative force.

An examination of the record certified by the clerk of the lower court will show that the various allegations of the answer are not in accord with the facts. The fact of the matter is that an attempt is now being made to bolster up some semblance of a case for the respondent. We categorically deny the correctness of the statements of the answer which have been quoted and referred to.

As to the acquiescence of the officers and representatives of the insurance company in the bankruptcy proceedings, we rely upon the affidavit of petitioner filed before the trial court. The things they did during the period of the administration of this estate in the bankruptcy court are quite fully set out. Everything on their part was voluntary except the appearance for examination, which was pursuant to subpoena. The very fact that these officers obeyed the subpoena shows recognition of the authority and jurisdiction of the bankruptcy court. No one ever thought of questioning the regularity of the proceeding. The objections finally raised are undoubtedly due to accidental discovery of the exceptions in the law, which up until such discovery had been overlooked. The objections so tardily made are in the interests of no one, unless it be some of the officers and representatives of the insurance company, and cer-

tain creditors who claim a preference and who may obtain such preference if the affairs of the respondent are administered by the state court. Granting that respondent and its officers were not familiar with or overlooked the exception of insurance corporations from the effect of the act, they are not excused. They will not be heard to plead ignorance of the law.

The affidavit of petitioner filed in opposition to the motion to dismiss, and the objections to such motion (folios 20 to 28 record) were presented to the court below. They were as much a part of the record as respondent's petition to dismiss, and the affidavit submitted in support thereof. The court below is presumed to have considered all evidence presented, and there is nothing in the record tending to establish that he did not. But whether the court considered this affidavit or not is immaterial. It was his business to do so, and if he did not error was committed in deciding the case upon the allegations of the petition for adjudication alone.

It is said that the Vallely affidavit was controverted upon the hearing. The record will be searched in vain for the slightest denial or refutation of a single allegation of this affidavit. What may have been in counsel's mind at the time of the hearing, or what may be in his mind at this time is of no consequence. We are not bound by mental operations. As this record stands, every statement in the affidavit referred to must be accepted as true, and in fact is true. The attempt to inject new issues by answer at this time cannot succeed.

The statement that there was no question of fact involved or considered by the court below is in direct conflict with the certified record presented to this court. It will be found that the showing in opposition to the dismissal was made in the same way that was done in many of the cases which we have cited. These facts, upon

which we predicate estoppel against the respondent, are generally outside the record proper of a bankruptcy case. Of course, they would be quite immaterial if the court was utterly powerless to make the adjudication because of the fact that respondent is an insurance company. But if we understand the decisions, the court had power to adjudicate, and the adjudication stands unless rescinded in some proper manner. The estoppel for which we contend is properly shown by outside evidence, and when established furnishes an additional or cumulative reason for sustaining the jurisdiction of the bankruptcy court.

Of course there is nothing to the suggestion that the order which we seek to have reviewed is in effect an order refusing to adjudicate. The referee made an adjudication and had authority to do so.

As to the failure of creditors to appear at the hearing, we find no evidence in the record that creditors were served with notice. Whether they were or not is immaterial. The trustee represents creditors, and he has taken the course in this case which, if successful, will result in the greatest benefit to creditors.

Counsel in the court below throughout their brief and in all that part of their argument relating to the jurisdiction of the Bankruptcy Court seem to overlook the fact that the jurisdicion of that Court is granted and defined by Section 2 of Chapter 11 of the Bankruptcy law, which contains no limitations as to the persons or corporations that may be adjudged bankrupts, and that subdivisions A and B of Section 4 of Chapter III does not relate to the jurisdiction of the Court at all, but is an enactment covering procedure, like the numerous State statutes requiring certain suits to be brought in certain counties, and similar statutes.

That the proper method to review the exact question involved

here is by a petition to revise, has been settled by this court and the circuit court of appeals of the eighth circuit.

Plymouth Cordage Co. vs. Smith, 194 U. S. 311;
Stevens vs. Nave-McCord, etc., 150 Fed. 71;
Dodge vs. Norlin, 133 Fed. 363;
In re Plymouth Cordage Co., 135 Fed. 1000;
C. C. Taft & Co. vs. Century Savings Bank, 141 Fed. 369;
In re Holmes, 142 Fed. 391;
In re McKenzie, 142 Fed. 383.

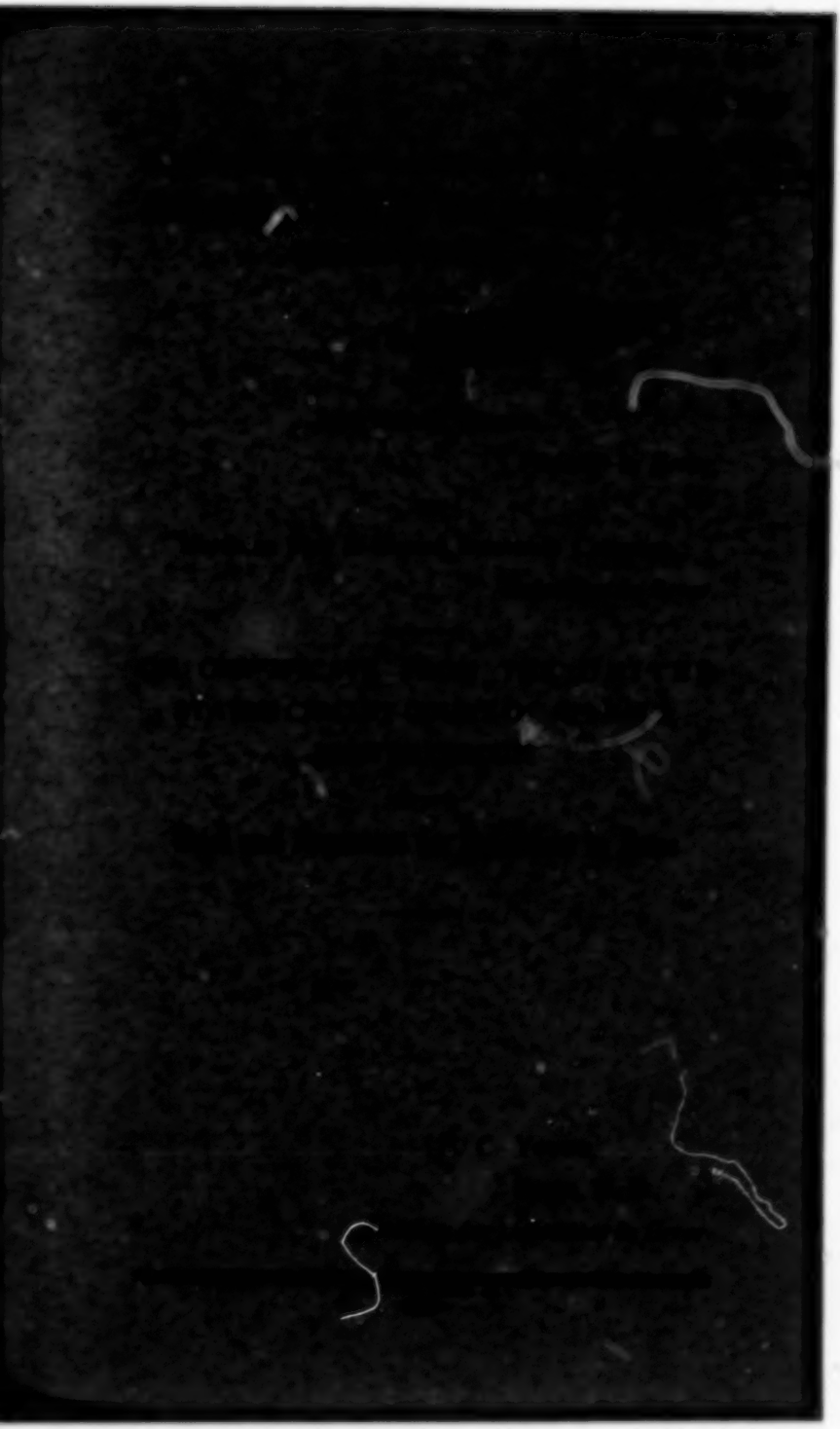
The argument advanced below to sustain the view that subdivisions A and B of Section 4 of the Bankruptcy Act should be construed as being limitations on the jurisdiction of the court because Congress must have had in mind the evil results that would follow from a city for instance like St. Paul being thrown into involuntary bankruptcy, seems to double back on itself, when we remember the fact that municipal corporations have never been subject to any Bankruptcy Act, and they would not be subject to the present Act whether excepted therefrom or not.

Loveland on Bankruptcy, Section 125;
Walter vs. Iowa, etc., Ry. Co., 2 Dill. (U. S.) 487.

It is therefore urged that the order of the Bankruptcy Court dismissing the bankruptcy proceedings should be revised and reversed, and the bankruptcy court directed to complete the administration of the estate.

Respectfully submitted,

ROBT. G. BROWN,
Attorney for Plaintiff in Error,
C. J. MURPHY,
T. A. TOWER,
Grand Forks, N. D.,
Of Counsel.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918

No. 980.

John Vallely, as Trustee in Bankruptcy of the Northern Fire and Marine Insurance Company, a corporation,

Plaintiff in Error,

vs.

Northern Fire & Marine Insurance Company,

Defendant in Error.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR

STATEMENT OF CASE

The statement of case, as contained in Petitioner's Brief, is substantially correct, but yet we are moved to include a brief statement in our brief, not only for the purpose of putting it in our own language and in our own way, but to bring the matter once again to the attention of this court, and to bring it so to the attention of this court in connection with the opinion rendered by the trial Judge.

That an involuntary proceeding in bankruptcy against the Northern Fire & Marine Insurance Company of Grand Forks, North Dakota, was instituted by the filing of a petition on May 3rd, 1917, which among other things, stated:

"That the said Northern Fire & Marine Insurance Company is a corporation organized

under the laws of the State of North Dakota, and has until recently been engaged in the business of insuring property against loss by fire, hail, etc."

There was no appearance on behalf of the Company, and the Judge of this District, being absent from the District, the petition was by the clerk referred to the referee in bankruptcy who on May 28th, made an adjudication adjudging the above named Company a bankrupt, after which a trustee was appointed, who has since been in charge of the Company's business affairs.

On December 18th, 1917, the Northern Fire & Marine Insurance Company, in due form, moved the Court to set aside the said adjudication and for other relief upon the ground, generally, that the said Insurance Company was neither entitled to the benefit nor subject to the provisions of the bankruptcy laws of the United States, that the court at no time had jurisdiction of the subject matter in connection with the bankruptcy proceedings above referred to, and that the adjudication and all proceedings had thereunder, was without and beyond the jurisdiction of the United States District Court. Such objections being more particularly set forth in the motion as recited beginning on page 7 of the printed record.

An order to show cause was issued and served upon the trustee and others whose names appeared from the record and the matter finally brought on for hearing before the District Court, Honorable Chas. F. Amidon, Judge, who, on January 12th, 1918, sustained the motion to dismiss, and in sustaining such motion filed an opinion, which after stating the facts, substantially as above, proceeds as follows:

"The case turns upon the proper meaning of subsection B of Section 4 of the Bankruptcy Act, which provides:

'Any incorporated company, and any moneyed business or commercial corporation, except a municipal, railroad, insurance or banking corporation, may be adjudged an involuntary bankrupt, etc.'

On the face of the petition the alleged bankrupt here is an 'insurance corporation'. Its name and the express averment of the petition show that this is its character, and that it had been 'engaged in the business of insuring property against loss by fire, hail, etc.' This brings the insurance company clearly within the exception expressed in Subdivision B of Section 4 of the Bankruptcy Act. In my judgment when this clearly appears the corporation is taken out of the jurisdiction of a bankruptcy court. To be sure, if there is a controversy as to whether a corporation is or is not within the excepted class, then a matter is presented which invokes the judicial action of the Bankruptcy Court. If the Court falls into error in exercising that jurisdiction, the error can only be corrected by some appropriate review. That was the nature of the case in Re First National Bank of Belle Fourche, 152 Fed. 64. When, however, there is no controversy before the court as to the character of the corporation proceeded against and especially when the petition invoking the action of a bankruptcy court alleges in express terms that the corporation proceeded against falls within the excepted class, I think that the averment as to the character of the corporation does not become a part simply of the petitioner's cause of action, but goes deeper, and shows that the corporation against whom the proceeding is instituted does not fall within the jurisdiction of the court."

An application, or petition for review, was presented to this court and the matter is now before the court for hearing on that petition, the contention of petitioner for review being, as we undersand it, that the question of the power of the District Court to adjudicate in this particular case, is not jurisdictional, and hence, such adjudication cannot be attacked.

ARGUMENT

It is possible that there may be somewhere in the books a bankruptcy case wherein the jurisdictional power of the court is so clearly raised by the petition or other original pleading, as in this case, but we have been unable to find it. The petition contained in clear and unmistakable language a statement of business and form of the corporation and clearly put it in the class excepted from the operation of the Bankruptcy Act. It was so clearly stated that attorneys for petitioner in their brief concede that the business of the respondent was insurance and that if appearance and objection to the adjudication had been made, the respondent would have been entitled to a dismissal.

Judge Amidon, in his written opinion, recognizes the rule of law, by which if a controversy had occurred as to whether a certain corporation is or is not within the excepted class, that then a matter is presented which invokes judicial action on the part of the Bankruptcy Court, but to his mind, when the petition itself clearly set out the position of the alleged bankrupt in the class over which the Court never had been given jurisdiction, then the Court was without jurisdiction to proceed further.

In support of their contention attorneys for Petitioner cite the Court to some few cases decided by the Circuit Court of Appeals for the 8th Circuit and other

Federal Courts, and we respectfully ask this Court to read these opinions in the light of the facts as they appear in this case and apply the principles of law announced, not only by this Circuit Court, but in decisions by the Supreme Court of the United States, to the facts in this case, confident that this Court will agree with us with respect to the non-applicability of the decisions cited by Petitioner. In these cases we find the petitions regular in form, or silent upon the question of the business of the alleged bankrupt. We find some irregularities expressly waived; in other instances we find the question of occupation, residence, etc., at issue, and in every case, is found some fact or circumstance depriving it of probative force as an authority in this case.

If the adjudication in the present case was beyond the jurisdiction of the court, then the matters set out in the trustee's affidavit are of no moment, because:

> "Every act of a Court beyond its jurisdiction is void."

Ex-Parte Reed, 100 U. S. 13; 25 L. Ed. 538; and no act on the part of either the alleged bankrupt or its representative or its creditors, could give the court jurisdiction, for

> "No man can put himself in the place of the sovereign, and make the adjudication of a Court valid by ratifying an unauthorized exercise of power by its agent, when the law of the land, which is the agent's power of attorney, declares that the court has no authority to render the judgment."
>
> *Springer, et al., vs. Shovender, et al.*, 116 N. Carolina 12; 33 L. R. A. 772.

It becomes necessary for us in determining this case to give careful consideration to the jurisdiction of the United States District Courts, not so much the general jurisdiction as the jurisdiction of such courts

in bankruptcy proceedings, which is a confined and limited jurisdiction.

The Supreme Court of the United States in speaking of the jurisdiction of Federal Courts, and the source of their jurisdiction, says:

> "As regards all courts of the United States inferior to this tribunal, two things are necessary to create jurisdiction, whether original or appellate. The constitution must have given to the court the capacity to take it, and an Act of Congress must have supplied it. Their concurrence is necessary to vest it. * * * To the extent that such action is not taken, the power lies dormant. It can be brought into activity in no other way."
>
> *Mayor, etc., vs. Cooper*, 6 Wall, 247; 18 L. Ed. 851.

Giving attention to the language of the Supreme Court just quoted, and having clearly in mind that the jurisdiction of the District Court in bankruptcy proceedings is that given it by the Bankruptcy Act and that alone, it is not beside the case for us to consider the changes that have taken place in the Bankruptcy Act with respect to those subject to its operation, as well as the reason for such changes.

Under the provisions of Sec. 37 of the Act of 1867 Bankruptcy Courts were given authority to declare bankrupt among others

> "All moneyed business or commercial corporations and joint stock companies."

The litigation that arose in the Bankruptcy Courts disclosed the fact that the designation in the Act of 1867 was too broad and in 1898 the Congress made a limitation, in which they gave the courts jurisdiction over

"Any un-incorporated company and any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuit."

Under that section questions arose from time to time as to what companies came within the definition thus given, and in 1910 the Act of 1898 was amended so as to read as at present, and the Act as it now stands, and as it stood at the time of the adjudication in this case, provided:

"Sec 4. Any person except a municipal, railroad, insurance or banking corporation, shall be entitled to the benefits of this Act as a voluntary bankrupt.

B. Any natural person, except * * * and any moneyed business or commercial corporation, except a municipal, railroad, insurance or banking corporation, may be adjudged an involuntary bankrupt, etc."

As said by Judge Philips in Cameron Town, etc. vs. Windstorm Insurance Co., 96 Fed. 756:

"When the Legislature changed the statute from 'money business or commercial corporations' to the language 'Principally engaged in mercantile pursuits' it is to be presumed it was done for a purpose."

And we can well add, when the Congress of the United States changed the Act of 1898 to explicitly exempt from its operation either as voluntary or involuntary bankrupts, "insurance, banking and municipal corporations," it was done for a purpose, and it requires but casual consideration of the manner of conduct of banking and insurance business to know the purpose.

The Congress of the United States always acts with some reason. The individual members of Congress are moved in their congressional actions to a

greater or less degree by local conditions and influences. We can readily understand that a member of Congress would hesitate to vote for an act putting the municipal corporations within his district under the supervision and control of a receiver appointed by what is oft-times looked upon as a foreign court in an ordinary Bankruptcy proceeding.

In the matter of banking and insurance corporations much the same reasoning applies, for in each instance, the states have made ample and complete provision for inspection, supervision and control.

We are particularly interested at this time in the matter of insurance companies. All states have insurance departments. Before it can enter into the business an insurance company must first receive a license from the State Insurance Department. Its affairs are then subject to inspection at all times by that Department and its agents. It is in no sense of the word a commercial or trading corporation. The money that it has, is received from, in the first instance, its stockholders, and in the second instance, from those who take out insurance, and consists of the premiums paid, which accumulated in the treasury of the Company, make up a fund contributed by all of those taking advantage of the business for the purpose of mutual protection. In other words, the money paid in is advanced payments made for the protection of the percentage who are to lose by reason of fire or other catastrophe against which the insurance is written.

The state statutes contain ample provision for requiring assessments on the part of stockholders, for the appointment of receivers and carrying on of the business, whenever the Department deems it advisable.

The Department is always in touch with the affairs of the Company. Its interest is not only exercised on behalf of the insured, but on behalf of the insuring company, and it can readily be understood that an Insurance Department thus keeping in constant touch with the business, is in much better position to handle the affairs of a company that may be in sore straits or in failing circumstances, than a court with no experience, no information, or even a trustee selected not because of his ability in that line, but because of his influence, perhaps, with some of the creditors; and so it was that Congress explicity excepted these particular companies from the operation of the Bankruptcy Act.

The question now to be settled by this court is whether that exception really meant something, or whether the language of Congress is to be so construed that it is completely nullified, which would be the result if a corporation that cannot take the benefits of voluntary proceedings, is permitted by silence to receive the same benefit when involuntary proceedings are instituted.

Counsel for petitioner in their brief say:

> "As soon as the petition is filed, and if the proceeding is an involuntary one, the subpoena has been served, jurisdiction is complete for the hearing and determination of all the issues involved, whatever the ultimate decision of the court may be."

Their contention is that without regard to the allegations of the petition, with utter disregard of the character of the alleged bankrupt, that if a petition, or rather a document labeled a petition in bankruptcy, is filed with the Clerk of the United States Court, and a subpoena issued, and served upon someone named in

that document, then the court has jurisdiction. We concede, of course, that no matter what the proceedings may be, that are instituted in a court of record, the court has the power and what may be called, perhaps, the jurisdiction to dismiss the proceedings if they are such that they are not cognizable in that court, but that does not mean that the court has the power or jurisdiction to proceed in the case.

If the power conferred upon the Court to determine whether it should proceed or not, conferred such jurisdiction as is contended for in petitioner's brief, then no case would ever arise in which a judgment of a court could be attacked collaterally.

Before the judgment of a court is clothed with such power and dignity that it cannot be attacked collaterally, it must be rendered in a case where the court has jurisdiction not only of the party, but the court must have jurisdiction of the particular cause of action set forth in the pleadings in that case; in other words the court must have jurisdiction of the subject matter.

It seems to us that counsel for petitioner has mistaken the general subject of bankruptcy proceedings for the subject matter of the proceedings complained of in this case. Our contention is that the subject matter in this case is the matter of an adjudication in bankruptcy implored against an insurance company, and the question is not "has the District Court of the United States jurisdiction in bankruptcy cases?" but "has the court jurisdiction in bankruptcy cases involving an insurance company?"

The counsel for petitioner bottom their contention largely on the language of the circuit court in "In the matter of the First National Bank," 152 Fed. Rep. 64.

As we view that case, it is not, in any vital hold-

ing, antagonistic to the contention of respondent herein, and in no instance where anything can be read into the case antagonistic to respondent's contention, is the opinion of the court in the Bank case of binding effect here, because the language is general and not used in the decision of a point necessary to the determination of that case.

We are not attempting to brush aside any rule announced by the circuit court, but we do feel that the facts in the two cases are so different that the pronouncement of the court, in the Bank case referred to, should not be considered in any way binding in deciding upon the facts in this particular case.

Looking at the Bank case referred to we find that a petition for involuntary bankruptcy adjudication was filed by certain creditors against the Widell Company. That the petition contained an averment that said Company

> "is and during all said time has been engaged in the business of manufacturing concrete arches and bridges, manufacturing and dressing stone, and selling the same, and railroad ditch contracting."

Without regard to the question as to whether or not the allegation was sufficient as against a demurrer on the ground that it was not a clear enough averment, the fact remains that the court found that it was a corporation chiefly engaged in manufacturing business and the Circuit Court of Appeals said in its opinion:

> "Our conclusion is that a corporation principally engaged in constructing concrete arches and bridges, and in dressing and selling stone, is engaged in a manufacturing pursuit and subject to adjudication in bankruptcy upon an involuntary petition."

So that any language that there may be in the opinion thereafter, dealing with the abstract question of jurisdiction comes under the category of general language, and as said by the Supreme Court of the United States,

> "General expressions in judicial opinions are to be taken in connection with the case in which they are used, and if they go beyond, while they may be entitled to respect, are not to be considered in any manner binding."

In the Bank case referred to this court says:

> "Jurisdiction of the subject matter and of the parties is the right to hear and determine the suit or proceeding in favor of, or against the respective parties to it."

Applying that rule to the case in hand, jurisdiction of the subject matter means the right to hear and determine a bankruptcy proceeding in favor of or against an insurance company. It does not mean the right to determine when a petition is presented to the court whether it can proceed or not, because as before stated, the court must always determine that question whenever any application is made to it, but it is the right to hear and determine the suit, either in favor of or against such a corporation. In this connection we would call the court's attention to the language of the Supreme Court in Cooper vs. Reynolds' Lessee, 10 Wall. 308: 19 L. Ed. 931,, wherein Mr. Justice Miller speaking for the court said:

> "It is as easy to give a general and comprehensive definition of the word 'jurisdiction,' as it is difficult to determine, in special cases, the precise conditions on which the right to exercise it depends. This right has reference to the power of the court over the parties, over the subject matter, over the res or property in contest, and to the authority of the court to render the judgment

> or decree which it assumes to make. By jurisdiction over the subject matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred."

Notwithstanding any general language that may be selected from the opinion in the Bank case, we contend there is nothing in that case that runs counter to the rule thus announced by the Supreme Court of the United States, which rule is peculiarly applicable to the present case. The jurisdiction of the United States District Court is to be sought for in the authority specially conferred. The Act of Congress creating that court as a Bankruptcy Court gave it certain, special, limited authority, and not only limited its authority to certain corporations and certain parties, but inserted an express provision that it should have no authority as a bankruptcy court over certain parties, among whom was an insurance company. The court has no jurisdiction except that conferred by the law creating it, and the law creating it not only did not give it jurisdiction over a company such as is involved in this case, but expressly excluded it from any authority or jurisdiction over such a company.

In Cowling vs. Nelson, et. al., the Supreme Court of Arkansas in a decision cited from 88 S. W. 913, in discussing the question of jurisdiction, quotes with approval from Collins vs. Paepcke-Leicht Lumber Co., 84 S .W. 1044, wherein the Court says in referring to an order of probate court selling lands to pay costs of administration:

> "But where its judgment shows affirmatively on the face that the court was proceeding in a matter over which it had no jurisdiction, or act-

ing beyond its jurisdictional limits, such judgment is void. * * * The confirmation cures all irregularities in the sale or the order therefor, but not jurisdictional defects."

In Clapp vs. McCabe, et al., 32 N. Y. Sup. 431, the Court speaking through presiding Judge Brown, said:

"The Supreme Court, under the constitution of the state, has general jurisdiction in law and equity, but the exercise of its power is subject to the limitations and regulations of the Code of Civil Procedure. When a person commences an action, the power of the court which he invokes and is entitled to have exercised in his behalf is that only which applies to the cause of action that he states in his complaint, and it is by this pleading that the scope of the power of the court in that action is to be determined. * * * It is not sufficient that a judgment is within the general power of the court, or that it adjudicates upon a matter of which the court has general jurisdiction; it must appear that the proceeding in which it was rendered was one that brings the power of the court into action."

To apply the rule to the case in hand, it is not sufficient that the United States District Court has bankruptcy jurisdiction, but it must appear that the court has jurisdiction over the action set forth in the petition.

To the same effect see:

In re Foley's Estate, 51 Pac. 834 (837);
Munday vs. Vail, 34 N. J. Law Reports, 418 (422);
In re Taylor, 102 Fed. 728;
In re Hudson River Elec. Co. 167 Fed. 986;
In re New York Tunnel Co., 166 Fed. 284;
In re N. Y. & N. J. Ice Lines, 147 Fed. 214;
Hopkins vs. Carpenter, et al., Fed. Cases No. 6,686.

The reasoning in In Re Elmira Steel Co., 109 Fed. 456 was not applied by the court in the Bank case, 152 Fed. 64 because of the difference in the facts but it strikes us that in the instant case the reasoning in the Elmira case is applicable and sound.

The opinion in the Elmira case was written by Referee Moss and affirmed by District Judge Hazel; for the main part it is a rather lengthy discussion of matters in which we have little or no concern, but we wish to call the court's attention to paragraph nine of the syllabus and that part of the opinion found on pages 478 and 479.

The opinion at page 479 reads as follows:

> "So it has been held that, to sustain proceedings in involuntary proceedings, the petition must allege and the proof show that the corporation is authorized by its charter and in fact principally engaged in the kind of business named in the act in declaring what corporations may be adjudged involuntary bankrupts. * * * And there can be no involuntary bankruptcy proceedings against a corporation not engaged principally in manufacturing, trading or mercantile pursuits."

See also:

In re New York & W. Water Co., 98 Fed. 711.
In re Keystone Coal Co., 109 Fed. 872.

Referring again to the Bank case, 152 Fed. 64, we find that the circuit court makes the statement that the question as to whether the Widell Company was engaged principally in a manufacturing pursuit was not jurisdictional, we assume that statement was made with reference to the facts of that particular case, and was not intended to lay down the rule that where a petition set out facts showing the alleged bankrupt within the exception, that it would not raise a jurisdictional question.

To again quote from the Supreme Court of the United States:

> "It is as easy to give a general and comprehen-

sive definition of the word 'jurisdiction' as it is difficult to determine, in special cases, the precise conditions on which the right to exercise it depends."

In our investigation of this matter we have been reminded again and again of the truth of the statement thus made by Mr. Justice Miller. We find various definitions of jurisdiction. We also find that there has been some modification of the rule so that it would appear that the subject of jurisdiction was one that had been in a process of evolution. In Munday vs. Vail, 34 N. J. Law Rep. 422, the Court in defining jurisdiction said:

> "Jurisdiction may be defined to be the right to adjudicate concerning the subject matter in the given case."

The rule as laid down by the modern decisions is, that before jurisdiction can be affirmed to exist it must appear that the law has given the tribunal capacity to entertain the complaint against the person or thing sought to be charged, and that such complaint has been preferred. In other words, in the instant case, before jurisdiction can be affirmed to exist, it must appear from the petition that the law has given the tribunal, that is, the United States District Court, capacity to entertain the petition against the Northern Fire & Marine Insurance Company.

Ex-Parte Reed, 100 U. S. 13; 25 L. Ed. 538;
Munday vs. Vail, 34 N. J. Law Rep. 422;
Cowling vs. Nelson, 88 S. W. 913 (Ark);
Springer vs. Shavender, 116 No. Car. 12; 33 L. R. A. 772;
Babb vs. Bruere, 23 Mo. App. 604;
Crow vs. Pratt, 51 Pac. 38 (Calif.);
Louisville Trust Co. vs. Comingor, 184 U. S. 18; 46 L. Ed. 413;
Halsbury Laws of England, Vol. 9, Page 13.

In this same connection we would call the court's attention to a decision of the Supreme Court of Ne-

veda, In re Foley's Estate, 51 Pac. 834, wherein the Court in speaking of the limitation upon the power of the court said:

> "The Legislature has declared when, and on whose application, and to whom, distribution may be made, in proceedings for partial and final distribution, respectively. The Courts are authorized to act in pursuance of these statutory provisions, and not otherwise."

The same can be said of the United States District Court in connection with the bankruptcy proceedings. The Congress of the United States has declared when, on whose application, and how the court may proceed in bankruptcy, and has declared that certain corporations, among them insurance companies, are not subject to adjudication in bankruptcy either voluntary or involuntary. The United States District Court as a bankruptcy court is authorized to act in pursuance of the statutory provision and not otherwise. There is no power in the United States District Court to declare the Northern Fire & Marine Insurance Company a bankrupt or to adjudicate upon it, and when the petition was presented to the court carrying upon its face the declaration of the business of the company, the court was without jurisdiction to proceed further.

Hope vs. Blair, 24 Amer. St. Rep. 369 (Mo.);
Myers vs. Berry, 41 Pac. 580 (Okla.);
Parker vs. Lynch, 56 Pac. 1082 (Okla.);

In Houck vs. Bank of Brinkley, 242 Fed. 881, the circuit court in an opinion handed down May 31st, 1917, announced a principle which we believe applicable to the case at bar. The Houck case involved an action on a note made payable to the makers, endorsed to a Missouri corporation and an action brought by an Arkansas corporation as assignee of the note.

The petition did not set out that such suit could have been brought to recover upon said note in the United States Court if no assignment had been made

and it appearing upon the face of the pleadings that before the assignment to the Arkansas corporation the note was held by a Missouri corporation, it was apparent that said action could not have been brought in the United States Court prior to the assignment, and the circuit court although the question was not raised in the court below, ordered the judgment of the lower court reversed and the suit dismissed for want of jurisdiction. The statute of the United States limiting the jurisdiction of the United States District Court in the matter of actions on promissory notes, under certain circumstances, is not more explicit than the limitation in regard to bankruptcy matters, and the petition in this case, disclosing, upon its face, an entire absence of power on the part of the court to adjudicate against the Northern Fire & Marine Insurance Company, the judgment of the court is void and subject to attack collaterally.

In considering the questions involved in this case we must not over look the fact that the lack of power on the part of the United States District Court to adjudicate on this petition appeared upon the face of the petition. It was not a case where the petition set forth facts entitling the court to proceed, or was even silent on the facts, and as was pointed out by Judge Amidon, in his written opinion, there is a distinction between those cases where the petition sets forth a proper cause or where it is silent and a case where the want of power appears upon the face of the petition.

Upon the question of the limited or special jurisdiction of the court, and of the restriction of courts within the limits authorized by the law creating them, as well as upon the question of the effect of the lack of power of the court appearing upon the petition, we find a very illuminating case in Galpin vs. Page, 18 Wall. 350; 21 L. Ed. 959. In this case Mr. Justice Field speaking for the Supreme Court, cites the general rule with respect to the presumption attaching to judgments, and then explains that these presumptions

are only indulged in to supply the absence of evidence or averments respecting the fact presumed. In the opinion of the court there appears a quotation from a decision of the Supreme Court of New Hampshire, after which Mr. Justice Field, himself, points out the extent of the special jurisdiction and the conditions of its exercise over subjects or of persons and that it necessarily depends upon the terms upon which the jurisdiction is granted and not upon the rank of the court upon which it is conferred.

> "The extent of the special jurisdiction and the conditions of its exercise over subjects or persons necessarily depend upon the terms in which the jurisdiction is granted, and not upon the rank of the court upon which it is conferred. Such jurisdiction is not, therefore, the less to be strictly pursued because the same court may possess over other subjects or other persons a more exteneded and general jurisdiction."

In Settlemier vs. Sullivan, 97 U. S. 444; 24 L. Ed. 1110, among other things it is said:

> "We do not question the doctrine that a court of general jurisdiction acting within the scope of its authority, that is, within the boundries which the law assigns to it with respect to subjects and persons, is presumed to act rightly and to have jurisdiction to render the judgment it pronounces until the contrary appears. But this presumption can only arise with respect to jurisdictional facts, concerning which the record is silent. It cannot be indulged when the evidence respecting the facts is stated, or averments respecting them are made. * * * If the record give the evidence or make an averment with respect to a jurisdictional fact, it will be taken to speak the truth, and the whole truth, in that regard; and no presumption will be allowed that other and different evidence was produced, or that the fact was otherwise than as averred."

In this same connection we would call attention to the language of the Supreme Court in Old Wayne Mutual Life Association of Indianapolis vs. McDonough, 204 U. S. 8; 51 L. Ed. 345. Wherein the Court says:

> "Upon principle the operation of every judgment must depend on the power of the court to render that judgment. * * * Presumptions are only indulged to supply the absence of evidence or averments respecting the facts presumed. They have no place for consideration when the evidence is disclosed or the averment is made. When, therefore, the record states the evidence or makes an averment with reference to a jurisdictional fact, it will be understood to speak the truth on that point, and it will not be presumed that there was other or different evidence respecting the fact or that the fact was otherwise than averred."

And the circuit court in Johnson vs. Hunter, 147 Fd. 133, at page 137 said, with respect to presumptions:

> "There is, therefore, no rule for presumptions, because they are indulged in respect of jurisdictional facts only when the record is silent, not when it discloses what was done and shown."

See also Empire Ranch and Cattle Co. vs. Coldren, 117 Pac. 1005; wherein at page 1008, the court speaking of a case similar in principle said:

> "When, however, the record does disclose that the court did not have jurisdiction of the defendant, the judgment is a mere nullity, and may be collaterally attacked by any person interested wherever and whenever it is brought in question."

In fact the circuit court in the matter of the First National Bank of Belle Fourche, 152 Fed. 64, before referred to, uses language disclosing that it was in the mind of the court that if the petition had disclosed upon its face the lack of power on the part of the Fed-

eral Court under the statute to adjudicate the alleged bankrupt, a bankrupt, then the court would have been without jurisdiction, for on page 68 the court expressly says:

> "The petition contained no statement that the Widell Corporation was not engaged in a manufacturing pursuit, and no showing that the court was without jurisdiction of the case, but it set forth the substance of a good cause of action and it was impregnable to attack after the adjudication."

The only conclusion to be drawn from the language being that in the mind of the court, if the petition had set forth that the Widell corporation was not engaged principally in a manufacturing pursuit, or had set forth that it was engaged in some business that completely excepted it from the operation of the bankruptcy law, then the court would have been without jurisdiction in the case. Again on page 70 the court in setting out the reasons why the adjudication was not void, set out the first reason as:

> "Because the record does not sustain the position that it shows that the corporation was not thus engaged."

If the contention of counsel for petitioner is correct, the language of the Bankruptcy Act in excepting banking corporations, insurance corporations and municipal corporations from the operation of the statute, is of no effect, as under the theory advanced by them a municipal corporation, such for instance, as the City of St. Paul, could be adjudicated a Bankrupt and a little negligence on the part of its officers leave it without redress. We cannot believe that Congress contemplated any such condition. On the contrary, it would seem to us that the purpose of Congress in making the exception was to withdraw those certain corporations from the power of the United States Court sitting as a court of bankruptcy and that the effect of

the statute is the same as though it had read in plain language:

> "The bankruptcy court shall have no jurisdiction in any case involving an insurance or banking corporation or a municipal corporation."

In fact, no other meaning can be given to the language.

As has already been suggested, if it is possible for a creditor to file an involuntary petition against an insurance or a banking corporation, or a municipal corporation, and for the alleged bankrupt, by silence and acquiescence to permit an adjudication, then it is made possible for either of them to do an act indirectly that the Congress of the United States has said they shall have no power to do, that is, become in effect, voluntary bankrupts. We submit, therefore, that under all of the facts and circumstances of this case, the order of the District Judge should be affirmed.

REVISION AND REVIEW

Although we have presented an argument to sustain the holding of the trial court on the motion to dismiss the bankruptcy proceedings against the respondent, we do not want to be understood as waiving our motion to dismiss this petition for revision and review on the ground that the proceedings herein by revision and review are without and beyond the jurisdiction of the Circuit Court of Appeals.

The adjudication in bankruptcy and the motion to dismiss, and the order of the trial court made thereon, are all within the term "bankruptcy proceedings" and the order of the District Court in this case is a final order which we believe appealable under Sec. 25-A of the Bankruptcy Act, and even if not appealable under Sec. 25-A, is appealable under Sec. 24-A of the Bankruptcy Act, and we contend that being appealable under either Sec. 25-A or Sec. 24-A it is not subject to revision and review under Sec. 24-B.

In making this contention we have not overlooked

the opinion of the circuit court of appeals for the 8th circuit in the case of Stevens, et. al., vs. Nave McCord Mercantile Company, et. al., 150 Fed. 71, but after considering that opinion and the facts of the case, and giving careful consideration to other cases involving much the same question, and finally giving full effect to the language of the Supreme Court of the United States in the matter of the petition of H. H. Loving, trustee, 224 U. S. 183; 56 L. Ed. 725, we submit that the rule as laid down by the Supreme Court absolutely bars the court from considering the order of the District Court in the instant case on a petition for revision and review, the language of the Supreme Court being:

> "The proceedings reviewable under Sec. 24-B are those administrative orders and decrees in the ordinary course of a Bankruptcy between the filing of the petition and the final settlement of the estate, which are not made especially appealable under Sec. 25-A. And that "this would include questions between the bankrupt and his creditor of an administrative character, and exclude such matters as are appealable under Sec. 24-A."

And if as contended by petitioner a question of fact is involved another reason is presented why review by petition is not the proper remedy.

We submit, therefore, that in the first place the respondent is entitled to the order of this Court dismissing the petition for revision and review, and that in case the court holds the right to review the action of the lower Court on petition for revision and review, that respondent is entitled to an order affirming the judgment of the District Court.

Respectfully submitted,

N. C. Young,
Attorney for Defendant in Error.

Tracy R. Bangs,
Philip R. Bangs,
Grand Forks, N. D.,
Of Counsel.

VALLELY, AS TRUSTEE IN BANKRUPTCY OF NORTHERN FIRE & MARINE INSURANCE COMPANY, *v.* NORTHERN FIRE & MARINE INSURANCE COMPANY.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 96. Submitted November 17, 1920.—Decided December 13, 1920.

1. A petition to revise in matter of law under § 24*b* of the Bankruptcy Act is the proper remedy to review an order of an inferior court of bankruptcy vacating an adjudication and dismissing the bankruptcy proceeding for want of jurisdiction upon the motion of the bankrupt after the expiration of the time for appeal, he having neither contested the involuntary petition against him nor appealed from the adjudication. P. 352.
2. Where it appears from the averments of a petition in involuntary bankruptcy that the person proceeded against is an insurance corporation and therefore within the exceptions of § 4*b* of the Bank-

ruptcy Act, as amended in 1910, the court of bankruptcy is without jurisdiction and its adjudication, rendered upon due service of process and default, and not appealed from, should be vacated and the proceeding dismissed upon the motion of the company, even after the time for appeal has expired. P. 352.

3. Where an insurance corporation adjudged bankrupt in an involuntary proceeding after the passage of the Act of 1910, upon due service of process and default, does not appeal from the adjudication but acquiesces therein and aids the trustee in the performance of his duties in administering the estate, it is not estopped from thereafter questioning the validity of the adjudication and the power of the court and the trustee to proceed. *Id.*

THE case is stated in the opinion.

Mr. Rome G. Brown for Vallely, Trustee. *Mr. C. J. Murphy* and *Mr. T. A. Toner* were also on the brief:

As soon as a petition is filed, the court has the duty, and the statute gives it the power, to decide whether an alleged bankrupt comes within the class that may be declared bankrupt. The decision of that fact involves the exercise of jurisdiction. The jurisdiction is none the less real and valid because the court might decide the question wrongly. Neither the allegation nor the fact that the alleged bankrupt is an insurance company, and as such exempt, is jurisdictional. If the court in the exercise of that power reached a wrong conclusion, the judgment is not void; it is merely error to be corrected on appeal or by motion to vacate, timely made; but as long as it stands it is binding on everyone. *In re Worsham*, 142 Fed. Rep. 121; *Edelstein* v. *United States*, 149 Fed. Rep. 636; *Foltz* v. *St. Louis & S. F. Ry. Co.*, 60 Fed. Rep. 316; *In re First National Bank*, 152 Fed. Rep. 64; *In re Broadway Savings Trust Co.*, 152 Fed. Rep. 152; *In re Plymouth Cordage Co.*, 135 Fed. Rep. 1000.

The following decisions are to the same effect: *In re New England Breeders' Club*, 169 Fed. Rep. 586; *Birch* v. *Steele*, 165 Fed. Rep. 577; *In re T. E. Hill Co.*, 159 Fed.

Rep. 73; *Sabin* v. *Larkin-Green Logging Co.*, 218 Fed. Rep. 984; *Roszell Bros.* v. *Continental Coal Co.*, 235 Fed. Rep. 343; *In re Brett*, 130 Fed. Rep. 981; *Denver First National Bank* v. *Klug*, 186 U. S. 202; *Des Moines Navigation Co.* v. *Iowa Homestead Co.*, 123 U. S. 552; *In re Columbia Real-Estate Co.*, 101 Fed. Rep. 971; *McCormick* v. *Sullivant*, 10 Wheat. 192.

In most of these cases the question related to the jurisdiction of the court where it appeared that the corporation against whom adjudication was sought was not one coming within the purview of the Bankruptcy Act. Other cases relate to the jurisdiction of the federal court generally, arising in instances where a diversity of citizenship was not shown. The principle involved is the same, and so recognized by the decisions of this as well as by other courts. In some of those cases particular emphasis was laid upon the fact that there had been some delay, and, even though it were not great in those particular cases, the court took notice of the fact that the speedy administration of bankrupt estates is contemplated by the law, and that prejudice and loss would result if interested parties were permitted, after recognizing proceedings of this kind, and participating therein, to question the validity thereof. The facts established in the record in this case show clearly that loss would result to the general creditors of respondent if the proceedings taken by the petitioner in connection with managing and conserving the estate of the respondent are ignored, and the bankruptcy set aside.

The jurisdiction of the bankruptcy court is granted and defined by § 2 of c. II of the Bankruptcy Law, which contains no limitations as to the persons or corporations that may be adjudged bankrupts. Subdivisions *a* and *b* of § 4 of c. III do not relate to the jurisdiction, but cover procedure, like the numerous state statutes requiring certain suits to be brought in certain counties, and similar statutes.

Municipal corporations have never been subject to any bankruptcy act, and they would not be subject to the present act whether excepted therefrom or not. Loveland on Bankruptcy, § 125; *Wagner* v. *Iowa, etc., Ry. Co.*, 2 Dill. 487.

Mr. N. C. Young for Northern Fire & Marine Insurance Company. *Mr. Tracy R. Bangs* and *Mr. Philip R. Bangs* were also on the brief.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The Insurance Company was adjudged an involuntary bankrupt May 3, 1917, upon petition of its creditors. The petition averred the corporate capacity of the Company under the laws of North Dakota, and that it had been "engaged in the business of insuring property against loss by fire, hail, etc." Process was duly issued and served, and, the Company making default, an order of adjudication was entered against it. No appeal was taken from the order. The administration of the estate proceeded in due course, claims presented, assets collected and reduced to money, payments made to protect equities, and suits brought by the trustee in his official capacity. In the matters of the estate the trustee frequently conferred with the president and secretary of the bankrupt and received from them coöperation, assistance and information without question of the validity of the adjudication. Considerable moneys were paid out and expenses incurred by the trustee.

After the above course of administration, and on December 18, 1917, the Company by its attorneys filed a motion in the District Court to vacate the adjudication as null and void, and to dismiss the proceedings, upon the ground that it appeared that the Company was an insur-

ance corporation and that the court was, therefore, without jurisdiction. The motion was sustained and an order entered vacating the adjudication and dismissing the petition of the creditors on authority of § 4-*b* of the Bankruptcy Act, as amended by the Act of June 25, 1910, c. 410, 36 Stat. 839, which provides that "any moneyed, business, or commercial corporation, except a municipal, railroad, insurance, or banking corporation, . . . may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act."

The trustee filed a petition to revise the order of the District Court in a matter of law in the Circuit Court of Appeals, and the latter court certifies that it is indispensable to the determination of the case, and to the end that the court may properly discharge its duty, desires instruction upon the following questions:

"1. Is a petition to revise in matter of law under section 24-*b* of the Bankruptcy Act the proper remedy to review an order of an inferior court of bankruptcy vacating an adjudication and dismissing the bankruptcy proceeding for want of jurisdiction upon the motion of the bankrupt after the expiration of the time for appeal, he having neither contested the involuntary petition against him nor appealing from the adjudication?

"2. Where it appears from the averments of a petition in involuntary bankruptcy that the person proceeded against is an insurance corporation and therefore within the exceptions of section 4-*b* of the Bankruptcy Act as amended June 25, 1910 (36 Stat. 839), is there such an absence of jurisdiction in the court of bankruptcy that its adjudication, rendered upon due service of process and default, and not appealed from, should be vacated and the proceeding be dismissed upon the motion of the bankrupt after the time for appeal has expired?

"3. Where an insurance corporation adjudged bankrupt

in an involuntary proceeding after the passage of the amendatory Act of June 25, 1910 (36 Stat. 839), upon due service of process and default, does not appeal from the adjudication but acquiesces therein and aids the trustee in the performance of his duties in administering the estate, may it be estopped from thereafter questioning the validity of the adjudication and the power of the court and the trustee to proceed?"

Of the construction of the statute there can be no controversy; what answer shall be made to the questions turns on other considerations, turns on the effect of the conduct of the Company as an estoppel. That it has such effect is contended by the trustee, and there is an express concession that if objection had been made the Company would have been entitled to a dismissal of the petition. It is, however, insisted that it is settled "that an erroneous adjudication against an exempt corporation, whether made by default or upon a contest or trial before the bankruptcy court, can be attacked only by appeal, writ of error, or prompt motion to vacate," and that § 4 does not relate to the jurisdiction of the court over the subject-matter. "It does not, therefore," is the further contention, "create or limit jurisdiction of the court with respect to its power to consider and pass upon the merits of the petition." And that "the valid exercise of jurisdiction does not depend on the correctness of the decision." And again, if the court in the exercise of its jurisdictional power, "reached a wrong conclusion, the judgment is not void; it is merely error to be corrected on appeal or by motion to vacate, timely made, but as long as it stands it is binding on every one." There is plausibility in the propositions taken in their generality, but there are opposing ones. Courts are constituted by authority and they can not go beyond the power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities. They are

not voidable, but simply void, and this even prior to reversal. *Elliott* v. *Peirsol*, 1 Pet. 328, 344; *Old Wayne Mutual Life Association* v. *McDonough*, 204 U. S. 8.

Which of the propositions shall prevail in a given case cannot be dogmatically asserted, and cases of their consideration and application can be cited against each other. There is such citation in the pending case. Plaintiff in error cites among others, *McCormick* v. *Sullivant*, 10 Wheat. 192; *Des Moines Navigation Co.* v. *Iowa Homestead Co.*, 123 U. S. 552; *Denver First National Bank* v. *Klug*, 186 U. S. 202.

McCormick v. *Sullivant* involved the effect of diversity of citizenship, and it was decided that an absence of its allegation did not impeach the judgment rendered in the case and preclude its being conclusive upon the parties. And it was said (as it has often been said), that the courts of the United States are "of limited jurisdiction; but they are not, on that account, inferior courts, in the technical sense of those words, whose judgments, taken alone, are to be disregarded. If the jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous, and may, upon writ of error or appeal, be reversed for that cause. But they are not absolute nullities."

In *Des Moines Navigation Co.* v. *Iowa Homestead Co.*, 123 U. S. 552, there came up to be considered also the effect of a prior adjudication as dependent upon an allegation of diversity of citizenship, and the ruling in *McCormick* v. *Sullivant* was affirmed.

The immediate comment on these cases is that the courts had jurisdiction of their subject-matter and necessarily power to pass upon the fact (diversity of citizenship) upon which that jurisdiction depended in the given case. The subject-matter of the suit was not withheld from them by explicit provision of the law which was their sole warrant of power.

Denver First National Bank v. *Klug* is nearer to the

question in the case at bar. It was a case in bankruptcy. The Act of July 1, 1898, 30 Stat. 544, provided that "any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil" might "be adjudged an involuntary bankrupt upon default or an impartial trial" and should "be subject to the provisions and entitled to the benefits" of the act.

A petition in involuntary bankruptcy was filed against Klug and a trial was had upon the issue, whether he was "engaged chiefly in farming" within the meaning of the act, and the jury having found accordingly, the District Court entered a judgment dismissing the petition. The question of the jurisdiction was certified to this court and it was held that the "District Court had and exercised jurisdiction." This further was said, "The conclusion was, it is true, that Klug could not be adjudged a bankrupt, but the court had jurisdiction to so determine, and its jurisdiction over the subject-matter was not and could not be questioned." Citing *Mueller* v. *Nugent*, 184 U. S. 1, 15; *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18, 25; *Smith* v. *McKay*, 161 U. S. 355.

It will be observed, therefore, that the Act of 1898 made jurisdiction depend upon an inquiry of fact and necessarily jurisdiction was conferred to make the inquiry, and pronounce judgment according to its result. The case, therefore, is not pertinent to, or authority upon the case at bar. The Act of June 25, 1910, which covers the present proceeding is peremptory in its prohibition. It excludes, by § 4-*a*, insurance corporations from the benefits of voluntary bankruptcy, and by sub-division *b* prohibits them from being adjudged involuntary bankrupts. The effect of these provisions is that there is no statute of bankruptcy as to the excepted corporations, and necessarily there is no power in the District Court to include them. In other words, the policy of the law is to leave the relation and remedies of "municipal, railroad, insur-

ance, or banking" corporations to their creditors and their creditors to them, to other provisions of law. It is easy to see in what disorder a different policy would result. We may use for illustration a municipal corporation. Its creditors may be enterprising, its officers acquiescent or indifferent; can, therefore, the allegations of the former and the default of the latter confer jurisdiction on the District Court to entertain a petition in bankruptcy against the corporation and render a decree therein, and if not, why not? If consent can confirm jurisdiction, why not initially confer jurisdiction? It is not necessary to point out the disorder that would hence result and the difficulties that the officers of a bankruptcy court would encounter in such situation. The legislative power thought care against the possibility of it was necessary, and in that care associated insurance corporations. For a court to extend the act to corporations of either kind is to enact a law, not to execute one.

The first question concerns procedure only, and should be answered in the affirmative. *Denver First National Bank* v. *Klug, supra; Matter of Loving*, 224 U. S. 183.

The second and third questions concern the merits and are respectively answered in the affirmative and negative.

So ordered.